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Supreme Court, U.S.
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No. 04-112

IN THE

# Supreme Court of the United States

TYRONE TATE,

*Petitioner,*

*v.*

MICHAEL KOPEC,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION

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## RESPONDENT'S STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Third Circuit Court of Appeals properly found that it was clearly established that the Fourth Amendment applied to a police officer who refused to make a prompt and reasonable inspection to ascertain the validity of a suspect's immediate and repeated complaints of extreme pain due to excessively tight handcuffs when benign circumstances were present and when the failure to loosen the handcuffs for at least ten minutes caused the suspect permanent nerve damage to his wrist?

2. Whether there exists a split among the Federal Circuit Courts of Appeals with regard to the resolution of the question above.

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## RESPONDENT'S STATEMENT OF THE CASE

In the evening of February 3, 2000, Respondent Michael Kopec and his girlfriend, Pamela Smith (whom Respondent later married), trespassed onto the frozen lake at the Sherry Lake Apartment Complex in Conshohocken (Whitemarsh Township), Montgomery County, Pennsylvania (A9-10). This lake, which was surrounded by a fence, was on the property where Pamela Smith (now Pamela Kopec) rented an apartment (A11). To gain entrance to the lake, Respondent jumped over the fence while Pamela Kopec squeezed through an opening (A11-12). There were no "No Trespassing" or similar signs on the fence or in the vicinity (A56).

Respondent who was, and still is, an electrical engineer employed by Lockheed-Martin, (A8) and Pamela Kopec were frolicking on the ice when Petitioner Officer Tyrone Tate arrived in response to an anonymous call (A133). Officer Tate directed both of them to get off the lake, a command which both of them promptly complied with (A22).

Officer Tate did not intend to charge Respondent or Pamela Kopec with trespassing or anything else, but he wanted to obtain their names, addresses and telephone numbers for his routine records (A25; 138). Officer Tate repeatedly asked Respondent for this information, but Respondent refused to provide it. Respondent also told Pamela Kopec not to provide this (A25-27). Officer Tate was annoyed and frustrated that on this night, after a snowstorm, he had to spend all this time with Respondent merely because Respondent would not provide identifying data (A143-144; 176-177). Eventually, Officer Tate arrested Respondent for disorderly conduct, and handcuffed him behind his back (A149-150). In describing Officer Tate's demeanor prior to

handcuffing Respondent, Pamela Kopec said that he "seemed to get annoyed or irritated." (A103)

Within about ten seconds of being handcuffed, Respondent began to lose feeling in his right hand and expressed this Officer Tate, requesting that he loosen the handcuffs, but Officer Tate ignored him (A30). Respondent asked the officer if "this is what you do when people don't give you information." Still, the officer ignored him (A30).

Officer Tate took Respondent to his police car several feet away and left him there alongside of it as he went to interview Pamela Kopec, who was close by (A30-31). As Officer Tate walked away from Respondent, Respondent told him the pain was now unbearable and begged Officer Tate to loosen the handcuffs. Again, Respondent was ignored. Soon thereafter, Respondent began to feel faint from the pain caused by the handcuffs and fell to the ground. A fourth time he implored Officer Tate to take the handcuffs off him and told him that he could not feel his right hand anymore. For he first time, Officer Tate responded. The officer said that "he will be there in a minute," but he made no effort to come to Respondent within that time. Then, for the fifth time, Respondent asked Officer Tate to loosen or remove the handcuffs because of the excruciating pain he was suffering from the excessively tight handcuffing (A30-31; 99; 103). Officer Tate admits that he heard, but ignored, Respondent's requests to loosen the handcuffs (A162; 165). Finally, Officer Tate loosened the handcuffs.

While Respondent testified at his deposition that the handcuffs were on him for about ten minutes before they were loosened (A38), Pamela Kopec stated that the handcuffs were on Respondent for ten to fifteen minutes before they

were loosened (A107-108). Officer Tate recalls this time period as between four to eight minutes (A167).

The excessively tight handcuffs applied to Respondent's right wrist caused him to suffer permanent nerve damage to that wrist. He was under the care of a hand surgeon for over a year. See reports of Randall W. Culp, M.D. dated December 14, 2001 (A200-201), and September 17, 2002 (A202).

Even though there was no signage on the fence surrounding the lake on which Respondent trespassed or nearby, Respondent concedes that he was trespassing under 18 Pa. C.S.A. § 3503(b)(1)(iii). Although, typically, at worst, someone would be charged with trespassing in this situation and would be given a citation, Respondent concedes that under the circumstances, Officer Tate was lawfully able to arrest and handcuff him.

Respondent, as well as Pamela Kopec, were wrongfully charged with disorderly conduct and found not guilty (A56-57). Respondent further concedes that neither the incorrect charge nor the disposition of his case in their favor before the local District Justice is material to this civil rights case.

## REASONS FOR DENYING THE PETITION

1. **It was clearly established in the Third Circuit that the Fourth Amendment applied to a police officer who refused to make a prompt and reasonable inspection to ascertain if a suspect's immediate and repeated complaints of extreme pain due to excessively tight handcuffs were valid when benign circumstances were present and when the failure to loosen the handcuffs for at least ten minutes caused the suspect permanent nerve damage to his wrist.**

Although some of the language used by the Third Circuit Court of Appeals in its Opinion in this case appears to be "general" as Tate claims, clearly the Opinion addressed the particularized facts it was confronted with for purposes of its analysis. The Court discussed the immediate and severe wrist pain Kopec was suffering from due to the excessively tight handcuffing and the court stated how Kopec repeatedly expressed to Officer Tate, soon after the Officer applied the handcuffs, that Kopec was experiencing great pain in his wrists due to this handcuffing. The Court further described the rather benign circumstances the officer was facing in this summary trespass case and the Court reviewed the police officer's failure to promptly inspect the handcuffs on Kopec's wrists to determine whether they were, in fact, too tight. Then the court pointed out that by the time Officer Tate did take a look, at least ten minutes after he had applied the handcuffs, it was too late. Although the police officer did finally loosen the handcuffs, permanent nerve damage to Kopec's right wrist had already occurred.

*Hope v. Pelzer*, 536 U.S. 730 (2002), was the last Supreme Court case setting forth the legal analysis to be

applied in determining the meaning of "clearly established" for purposes of litigation of a claimed violation of a federal constitutional right. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Malley v. Briggs*, 475 U.S. 335 (1986); *Anderson v. Creighton*, 483 U.S. 635 (1987); *United States v. Lanier*, 520 U.S. 259 (1997); *Wilson v. Layne*, 526 U.S. 603 (1999) and *Saucier v. Katz*, 533 U.S. 194 (2001). Pursuant to these cases, the constitutional right that Kopec asserts was violated by Officer Tate was "clearly established" prior to the incident giving rise to the suit.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent.

*Anderson v. Creighton*, 483 U.S. at 640.

Purposeful, unjustified physical abuse by a police officer of a suspect is a clearly established constitutional violation throughout this nation. Whether the physical abuse is by a beating or by any other means makes no difference. The precise conduct need not have been previously held to be unlawful in order for a police officer to forfeit his claim to qualified immunity. *Wilson v. Layne*, 526 U.S. at 615 (1999). Law enforcement officials can no longer claim they were not on notice that particular conduct, that was obviously or inherently cruel, was unconstitutional just because a court in the officer's circuit had not yet ruled that the specific

conduct the police officer engaged in was illegal. As the Supreme Court explained in *Hope v. Pelzer*, 536 U.S. at 14, "Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts."

In *Watkins v. City of Oakland*, 145 F.3d 1087, 1092-3 (9th Cir. 1998) the purposefully long duration of a police dog bite and the police encouragement of the continuation of the dog attack amounted to excessive force. The police had to be on notice that the egregiousness of their behavior amounted to a Fourth Amendment violation, and that this was clearly established even though there was no prior specific precedent in the circuit for such a holding. In *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), the court stated, "We need no federal case directly on point to establish that kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law, and that reasonable officers would have been aware that such was the case." In *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002), the court stated, "[A] constitutional right is clearly established for qualified immunity purposes not only when it has been 'specifically adjudicated' but also when it is 'manifestly included within more general applications of the core constitutional principles invoked."

And, in *Murrell v. School District No. 1, Denver*, 186 F.3d 1238, 1251 (10th Cir. 1999), the court held that "We have never said that there must be a case presenting the exact fact situation at hand in order to give parties notice of what constitutes actionable conduct. Rather, we require parties to make reasonable applications of the prevailing law to their own circumstances." In *Suboh v. District Attorney's Office of Suffolk Dist.*, 298 F.3d 81. 93 (1st Cir. 2002), the court declared, "We have no doubt that there is a clearly established constitutional right at stake, although we have found no case exactly on all fours with the facts of this case. The difference in contexts in which the right is discussed in the case law does not mean such a right does not exist."

Courts have consistently held that "officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen do not act in an objectively reasonable manner." *Jones v Buchanan*, 325 F.3d 520, 532 (4th Cir. 2003). Therefore, for example, in *LaLond v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000), the Ninth Circuit Court of Appeals wrote that pepper spray "may be reasonable as a general policy to bring an arrestee under control, but in a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force." And a year later in *Deorle v. Rutherford*, 272 F.3d 1272, 1274-5 (9th Cir. 2001), that same court declared, "Notwithstanding the absence of direct precedent . . . , officers would [otherwise] escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct."

Tate makes reference in his Brief, at pages 15-17, to an unpublished Opinion from the Third Circuit, *Istvanik v. Rogge*, 50 Fed. Appx. 533, 537, 2002 U.S. App. LEXIS 22436, **7-8 (3d Cir. 2002) (unpub.) However, what is quite revealing and distinguishable in that Opinion, as compared to the case now under consideration, is that the Court in the *Istvanik* case stated as follows,

> [t]here is nothing in Plaintiff's testimony from which the Court can conclude that Plaintiff was repeatedly complaining of pain and Officer Rogge callously ignored these complaints." App. at 37. Istvanik argues that this statement is false because he testified that he was in pain while double-cuffed. However, Istvanik has taken the district court's statement out of context. The district court was referring to the time after Istvanik had been double-cuffed, while he sat on the floor of the holding cell. There is nothing in the record, and indeed Istvanik points to nothing, that suggests that Istvanik complained to Rogge after being double-cuffed and that the officer then ignored the complaints.

In addition, in *Istvanik*, the suspect who had been arrested for drunk driving, was "thoroughly uncooperative," and he only complained afterwards that the handcuffs were "too tight." Furthermore, he provided no evidence of injury. In the instant case, in distinct contrast, Kopec repeatedly begged Officer Tate to loosen or remove the handcuffs because they were causing him excruciating pain, Kopec's lack of cooperation was only that he would not provide his name, address and telephone number, and Tate willfully and maliciously ignored Kopec for at least ten minutes which

caused Kopec to suffer permanent nerve damage to his right wrist. While the police officer's conduct in *Istvanik* was "objectively reasonable," the police officer's conduct in the instant case clearly was not.

While there are a vast number of cases throughout the Circuits that substantiate what "clearly established" means in the context of excessive force and other claims of constitutional violations when no specific factual precedent existed, the Third Circuit has had its share of such cases as well. In *Brown v. Muhlenberg Tp.*, 269 F.3d 205, 211 n.4 (3d Cir. 2001), *reh'g and reh'g en banc denied*, 273 F.3d 390 (3d Cir. 2001), the court explained that a reasonable officer should have known from general well-established principles flowing from the Fourth Amendment "that he could [not] lawfully destroy a pet who posed no immediate danger and whose owners were known, available, and desirous of assuming custody." In *Sterling v. Borough of Minersville*, 232 F.3d 190, 197, 198 (3d Cir. 2000), the court stated that a "constitutional violation with respect to threatened disclosure of sexual orientation was apparent notwithstanding fact that very action in question had not previously been held to be unlawful." And in *Gruenke v. Seip*, 225 F.3d 290, 300 (3d Cir. 2000), the court concluded that "[m]erely because the Supreme Court has not yet ruled on whether a school official's administration of a pregnancy test to a student violates her Fourth Amendment rights does not mean the right is not clearly established."

Therefore, even though there was no fact-specific published case in the Third Circuit to support the opinion in the matter now under consideration, pursuant to principles of law firmly and clearly stated in the decisions the United States Supreme Court, the Third Circuit Court of Appeals

and in all the other Circuits, Officer Tate knew or should have known that he was committing a Fourth Amendment clearly established excessive force violation. "No reasonable officer would believe that the abusive application of handcuffs was constitutional." *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993). *See also Martin v. Heideman*, 106 F.3d 1308, 1312 (6th Cir. 1997); ); *Alexander v. County of Los Angeles*, 64 F.3rd 1315 (9th Cir. 1995); *Calamia v. City of New York*, 879 F.2d 1025 (2d Cir. 1989).

**2. A split in the Circuits does not exist with regard to a law enforcement officer purposefully using handcuffs to cause a suspect extreme pain.**

Officer Tate sets forth numerous cases in his Brief in an effort to show that there is substantial conflict in the Circuits with regard to whether the use of handcuffing can amount to an excessive force claim under the Fourth Amendment. Had Tate, instead, collected all the cases he could find pertaining to the use of police officers' nightsticks, fists, flashlights, or police dogs, etc., he also would have found a range of results throughout the Circuits. The reason for this is that while the constitutional analysis is consistent, the results are dependent on the various factual circumstances of each case. Whether the claimed use of excessive force is by handcuffing or by any other means, the core constitutional principles to be applied are the same, and they have been thoroughly established by the Supreme Court as well as by the Third Circuit. This has been analyzed under the first argument in this Brief in Opposition.

Therefore, a review of the cases provided by Tate does not support a conflict among the Circuits in instances when the circumstances were similar to the matter now under

consideration. The courts in those cases have uniformly held that a claim of excessive force was made out when the police officer (a) was aware that the handcuffed suspect was repeatedly claiming that the cuffs were causing him extreme pain, (b) the officer purposefully ignored the suspect for a period of time, (c) the officer was not confronted with a serous crime or a dangerous situation that prevented him from promptly determining if the suspect's claim was authentic, and (d) as a consequence of the officer's failure to ascertain if the suspect's claim was valid, the suspect sustained serious or permanent injury. See, for example, *Pana-Borrero v. Estremeda*, 375 F.3d 7 (1st Cir. 2004); *Braun v. Baldwin*, 346 F.3d 761 (7th Cir. 2003); *Crumley v. City of St. Paul*, 324 F.3d 1003, (8th Cir. 2003); *Bastien v. Goddard*, 279 F.3d 10, (1st Cir. 2003); *Kakla v. Hujlm*, 310 F.3d 1046 (8th Cir. 2002); *Burchett v. Kiefer*, 310 F.2d 937, 944-45 (6th Cir. 2002); *Rodriguez v. Farrell*, 280 F.3d 1341 (11th Cir. 2002). The only conflict found in the cases presented by Tate is that some Circuits require a serious or permanent handcuffing injury before finding a Fourth Amendment violation; however, that is not a relevant consideration in the instant matter because Kopec did suffer such a grievous injury.

## CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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